



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 24, 1998

Mr. Ryan Tredway  
Staff Attorney  
Texas Department of Insurance  
Legal and Compliance, MC 110-1A  
P.O. Box 149104  
Austin, Texas 78714-9104

OR98-1757

Dear Mr. Tredway:

You ask whether certain information is subject to required public disclosure under the Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 116016.

The Texas Department of Insurance (the "department") received a request for information concerning the supervision, conservatorship and receivership of American Eagle Insurance Company (the "company"). You state that some records relating to the company's supervision and conservatorship will be released to the requestor in accordance with section 3A(a) of article 21.28-A of the Insurance Code. The department asserts that portions of the requested information are excepted from disclosure based on sections 552.101, 552.111 and 552.112 of the Government Code.<sup>1</sup> The department has submitted representative samples of the information at issue.<sup>2</sup>

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<sup>1</sup>The department has withdrawn its claims under sections 552.102, 552.107, 552.110 and 552.305. We note that section 3A(a) of article 21.28-A of the Insurance Code makes confidential various information in the possession of the department relating to the supervision or conservatorship of any insurance company during the period of supervision and conservatorship. The provision states that on termination of the supervision and conservatorship, this information "becomes public information." Apparently, the supervision and conservatorship of the company has been terminated. However, we do not believe that by stating that the information becomes public, section 3A(a) means that the department may not withhold information relating to the supervision or conservatorship based on other applicable exceptions in the Open Records Act. Rather, we believe that this provision means that on termination of the supervision and conservatorship, the confidentiality of section 3A(a) is extinguished.

<sup>2</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should

This office notified Jack M. Webb & Associates, Inc. ("Webb") of this request because the release of portions of the information may implicate Webb's privacy or proprietary interests. See Gov't Code § 552.305 (permitting interested third party to submit reasons requested information should be withheld or released). Webb asserts that its bid proposal to serve as Special Deputy Receiver of the company is excepted from required public disclosure based on sections 552.104 of the Government Code and section 11 of article 21.28(f) of the Insurance Code. Webb also maintains that the release of portions of the information implicates its privacy interests and the privacy interests of its subcontractors and professional firms with whom it works. Finally, Webb claims that the format of its proposal as well as the proposal's component parts are trade secrets.

Section 552.101 of the Government Code excepts from disclosure information that is confidential by law, including information that is made confidential by statute. Both the department and Webb raise section 11(f) of article 21.28 of the Insurance Code, which reads as follows:

Chapter 552, Government Code, shall not apply to any records of a receivership estate, or to the records of an insurance company prior to its receivership, held by the receiver or by a special deputy receiver under this Article.

The department urges that this provision applies to all records relating to the company's receivership. Webb asserts that its proposal is a record of the receivership estate made confidential by section 11(f).

Prior decisions of this office concluded that records generated during the process of the selection of a special deputy receiver, including bid proposals, are not "records of a receivership estate." Open Records Letter Nos. 97-2845 (1997), 98-1099 (1998). Thus, we conclude that section 11(f) generally does not apply to Webb's proposal.

On the other hand, section 11(f) does apply to company records transferred to a receiver pursuant to Insurance Code article 21.28, section 4(e), and insurance company records filed with the department by special deputy receivers. Open Records Letter No. 97-2088 (1997); *see also* Ins. Code art. 21.21, § 2(1) (when performing duties of receiver, commissioner and special deputy receiver and their agents and employees shall be considered to be acting on behalf of receivership estate). Thus, the act does not apply to company records the receiver held or to documents the receiver submitted to the department when performing receiver duties. Nor does the act apply to information in Webb's proposal

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submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

that is information about an insurance company while in receivership. We note that Webb's proposal contains information about American Eagle Insurance Company while in receivership as well as information about other companies while in receivership. We have marked portions of the proposal that appear to be the type of information that reveals information about a company in receivership.

We will consider Webb's other arguments against disclosure of its proposal. Webb asserts that the proposal's format is a trade secret. Webb also asserts that various parts of its proposal are trade secrets. Section 552.110 of the Government Code excepts two types of information from required public disclosure: (1) a trade secret and (2) confidential commercial or financial information obtained from a person. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS, § 757 (1939).<sup>3</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

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<sup>3</sup>The six factors include: 1) the extent to which the information is known outside of [the company's] business; 2) the extent to which it is known by employees and others involved in [the company's] business; 3) the extent of measures taken by [the company] to guard the secrecy of the information; 4) the value of the information to [the company] and to [its] competitors; 5) the amount of effort or money expended by [the company] in developing this information; 6) the ease or difficulty with which the information could be properly acquired or duplicated by others. RESTATEMENT OF TORTS, § 757 (1939)

We have reviewed Webb's arguments and the information Webb submitted. We conclude that Webb has not established that the proposal in its entirety or any portion of the proposal is a trade secret.

Nor has Webb established that the release of its proposal would cause substantial harm to its competitive position, which is the test for determining the applicability of the commercial and financial prong of section 552.110. Accordingly, the department may not withhold the proposal from disclosure based on section 552.110.

Webb raises concern for the privacy interest of several third party subcontractors whose resumes, fee proposals and job assignments are included in the proposal. Section 552.101 excepts from required public disclosure information considered to be confidential by law, including information made confidential by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.* After review of the information, we conclude that the common-law right to privacy does not protect the information from disclosure.

Finally, Webb raises section 552.104 of the Government Code. The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See Open Records Decision No. 592 (1991)*. This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See Open Records Decision No. 463 (1987)*. Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. Consequently, a governmental body may waive section 552.104. *See Open Records Decision No. 592 (1992)* at 8. The department has not raised section 552.104; Webb lacks standing to do so. We conclude that section 552.104 is inapplicable in this instance.

Section 552.112(a) excepts from required public disclosure

information contained in or related to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both.

Insurance companies are included within the term "financial institutions" for purposes of section 552.112(a). *Open Records Decision No. 158 (1977)* at 5-6. You have marked portions of the requested information that contain information about the financial condition of insurance companies. The department may withhold this information from required public disclosure.

Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

Section 552.111 can apply to requested information in three distinct ways. First, this exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). This exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.* Second, the exception also protects preliminary drafts of a document that has been or will be released to the public and any comments or other notations on the drafts because they necessarily represent the advice, opinion, and recommendation of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 (1990). Finally, section 552.111 may cover attorney work product. This office stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must first show that the work product was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993). *See* Open Records Decision No. 647 (1996) at 5.<sup>4</sup> We agree that section 552.111 applies to portions of the information at issue and have marked the documents accordingly.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KHH/mjc

Ref.: ID# 116016

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<sup>4</sup>We note that section 552.111 does not apply to information that has been released to a third party.

Enclosures: Submitted documents

cc: Mr. Karl A. Shackelford  
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(w/o enclosures)